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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

## No. 326

JAMES F. DOBBS,
Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,
Respondent.

## PETITIONER'S REPLY BRIEF

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MAY IT PLEASE THE COURT:

Respondent contends in its brief[1] that there is no justification for granting the application for a *writ*, because it claims that petitioner's right to future maintenance and cure is "automatically" reserved.

Petitioner finds no comfort in respondent's apparent indifference to the plain, unambiguous language of the District Court (affirmed *verbatim* on appeal) that petitioner "reached that stage of improvement" from which no further improvement was to be expected, "on January 11, 1954"

[1]Respondent's Brief, pp. 4, 5.

and that, consequently, petitioner "was not entitled to maintenance and cure *thereafter* although he will require continued medical observation."[2]

The doubt and apprehension with which petitioner views these Courts' holdings stem from two significant words: "thereafter" and "future".

The finality of the unqualified, unmodified word "thereafter" is not obscure.[2A]

Just when does the "future" begin for this ward of the Court? Does it commence the day after the trial in the District Court, or should we reckon from the day after the appellate court's decision, or, perhaps, does petitioner's maintenance and cure right begin again after this Honorable Court has acted?

The answer to the question is obscured by the unusual situation which exists in the instant case; it is a situation which has not occurred heretofore during the experience of petitioner's counsel.

In this case there was before the appellate court material evidence which was not available at the trial in the District Court.[3]

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[2]Petitioner's Appendix "B", p. 27.

[2A]Black's Law Dictionary, Third Edition, p. 1726: "THEREAFTER. After the time last mentioned; after that; after that time; afterward, subsequently; thenceforth."

[3]Petitioner's Appendix "B", p. 27.

Since the decision of this Honorable Court in *McAllister v. United States*,[4] limiting the scope of appellate review in admiralty to that accorded in civil actions, no court has conducted a trial *de novo* on appeal. But, does *McAllister* completely abolish the institution of *de novo* appellate trials? We submit that it does not, and should not.

In the instant case, the Court of Appeals plainly acknowledged (a "complication" of the case) that, as a result of mental, nervous or emotional trouble, "*several months after the trial in the district court*" petitioner became a patient in a State mental institution.[5] Thus, the appellate court was aware of the new and material evidence, as it had a right to be on an admiralty appeal.

Furthermore, the Court of Appeals acknowledged that some causal connection might have existed between the "kidney trouble", the medication administered therefor and petitioner's mental illness.[6]

Notwithstanding these acknowledgments, the Court of Appeals apparently considered itself obliged to decide the case, not as of the time of the appeal *(de novo)*, but as of the time the case was tried in the District Court, only on the evidence available to the District Judge (and the expert witnesses who testified before him).

Considering itself thus restricted, the Court of Appeals stopped at the *McAllister* barrier, stating:

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[4]348 U. S. 19 (1954).
[5]Petitioner's Appendix "B", p. 27.
[6]Ibid.

"'Nor can we say, after the most careful examination of this record, that the findings of fact by the district court, . . . were clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20."[7]

Those findings of fact were made by the District Judge without the benefit of the evidence of petitioner's acute mental illness which had finally developed by the time of the appellate proceeding. Such evidence (and all of its permissive inferences) was not available at the time of the making of the findings which the then available evidence appeared to support.

Since the appeal in the instant case was a trial *de novo*, the entire body of the evidence and its inferences should have been completely and retrospectively considered by the Court of Appeals, as though it were the court of first instance.

We do not believe that in *McAllister v. United States* this Honorable Court intended to do away with *de novo* appellate trial in the instant circumstances. We submit that this case presents a classic illustration of circumstances for which the idea of *de novo* trial on appeal in admiralty was conceived.

If the Court of Appeals restricted itself as it appears to have done, this was error; a trial *de novo* should have been conducted on the appeal.

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[7] Petitioner's Appendix "B", pp. 29-30.

If the Court of Appeals actually conducted a trial *de novo*, as may be inferred from some of the language in the decision, we submit that the appellate court should have made appropriate findings of fact, *as of the time it considered the case*, so that petitioner might know exactly to what extent his medical history has been "merged in judgment."

This cause merits review by this Honorable Court, toward which end all of the foregoing is

Respectfully submitted.

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By: _____

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## CERTIFICATE

I, the undersigned member of the bar of the United States Supreme Court, hereby certify that copies of the above and foregoing reply brief have been served upon respondent by depositing the same in the United States Mails, postage prepaid, at New Orleans, Louisiana, addressed to Messrs. Andrew R. Martinez and Edward S. Bagley, 825 Whitney Building, New Orleans 12, Louisiana, this ____ day of September, 1957.

Samuel C. Gainsburgh